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Supreme Court, U.S.
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No.

IN THE
# Supreme Court of the United States

BERNARD JOSEPH ROSA, JR.,

Petitioner

v.

CALIFORNIA STATE BOARD OF ACCOUNTANCY, ET AL.,

Respondents

On Petition For Writ of Certiorari
To the United States Court of Appeals for the Ninth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The United States Court of Appeals for the Ninth Circuit upheld the decision of the United States District Court for the Northern District of California to dismiss Appellant's Complaint upon Motion by the California State Attorney General pursuant to Federal Rule of Civil Procedure 12(b)(6). The decision was based upon three contentions: 1) that Appellant's claims were barred by the doctrine of sovereign immunity; 2) that Appellant's claims were barred by the statute of limitations as the nucleus of his claim arose in 1993 in the form of a stipulation for probation in connection with a license to practice public accounting; and 3) that at the time of dismissal, Appellant was litigating a parallel state claim and consequently the United States District Court was barred from intervening under the doctrine set forth in Younger v. Harris. Appellant's contentions in response were: 1) that his claims as to the individual actors named in the lawsuit fell outside the scope of sovereign immunity; 2) that the doctrine of equitable tolling applies because the California State Board of Accountancy continued to rely upon the same fraudulently acquired document as late as 2003 to deny Petitioner reinstatement as a certified public accountant; and 3) that at the time Appellant's federal suit had progressed to the Court of Appeals, his state action had been dismissed leaving the field free for the

federal action to commence without application of the Younger "Doctrine."

The question presented is whether it was error to not remand Appellant's matter back to the United States District Court with instructions to grant leave to amend in the face of facts showing individual liability beyond the scope of sovereign immunity, despite application of equitable tolling of the statute(s) of limitations, and because the State of California's defense under Younger was then moot at the time the matter was heard on appeal.

## PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the parties to the proceeding below are as follows: the State of California, California Board of Accountancy; Carol Sigmann; Gregory P. Newington, Lawrence Knapp, Bill Lockyer, Joel Prime, Ronald Diedrich, Michael R. Granen, and Stephen J. Smith. All individual parties are sued in the proceeding below as agents of each other and of the State of California, California Board of Accountancy, and as individual defendants.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Bernard Joseph Rosa, Jr. respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The Court of Appeals' unpublished opinion is reported electronically at Rosa v. California, 2007 U.S. App. LEXIS 29157 and is also attached as Appendix A to the present petition. The opinion of the United States District Court for the Eastern District of California is unpublished but is available electronically at Rosa v. California, 2005 U.S. Dist. LEXIS 42411 (E.D. Cal., Aug. 5, 2005), and is also attached as Appendix B to the present petition.

## JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1331. The Court of Appeals had jurisdiction to properly review the decision of the District Court pursuant to 28 U.S.C. § 1291. The Court of Appeals filed its opinion denying Petitioner's appeal on 12 December 2007. Petitioner filed a timely Petition for Panel Rehearing pursuant to

Federal Rule of Appellate Procedure 40. Said Petition for Panel Rehearing was denied on 18 January 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 42 of the United States Code, at Section 1983 provides, in pertinent part:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Title 42 of the United States Code, at Section 1985 provides, in pertinent part, that:

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire...to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Finally, Title 42 of the United States Code, at Section 1986 states, in pertinent part:

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented;

and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action...

## STATEMENT

This matter concerns over a decade of effort by Petitioner to regain his license to practice public accounting in the State of California. Plaintiff received his C.P.A. license in 1969 and practiced public accounting in California (and, at times, in Utah) without incident until 1993 when he became the subject of disciplinary action before the California State Board of Accountancy.

In November 1993, Petitioner entered into an oral stipulation with the State Board of Accountancy to resolve the pending disciplinary action. Petitioner alleges that the State Board of Accountancy, through its representative Joel Prime, negotiated the finer points of the stipulation and agreed that references to "fraud, dishonesty, and gross negligence" would be removed. In reliance upon this representation, Petitioner signed a blank stipulation and faxed it to Mr. Prime. In April 1994, Petitioner received the modified stipulation with his signature attached. In continued reliance upon the representations of Mr. Prime, Petitioner did not review the stipulation until November 1994, when he realized that contrary to Mr.

Prime's representations (upon which Petitioner had relied in tendering his signature), the agreed-upon changes had not been integrated into the final draft. At a probation hearing shortly after November 1994, Petitioner attempted to rectify this issue on the record but was silenced by the Board of Accountancy members who had convened for said probation hearing. At that point, this and other financial difficulties caused Petitioner to become disillusioned and he withdrew from the practice of public accounting, experiencing a number of personal and professional crises.

In late 1999, Petitioner attempted to regain licensure as a public accountant in California. In October 1999, the State Board of Accountancy denied his Petition for reinstatement on the basis of the stipulation that is in contention in the proceedings below. Plaintiff again petitioned the State Board of Accountancy for reinstatement in 2001, 2002, 2003 and 2004. Each of these petitions was denied. On 10 May 2004, Petitioner initiated the proceeding below before the United States District Court for the Eastern District of California. The State Board of Accountancy moved to dismiss Petitioner's lawsuit pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Petitioner responded by filing a First Amended Complaint, which resulted in the Board withdrawing its first 12(b)(6) motion but filing a new one in response to the First Amended Complaint. The District Court granted the Board's decision and dismissed the First

Amended Complaint on the basis that the 1) that Appellant's claims were barred by the doctrine of sovereign immunity; and 2) that at the time of dismissal, Appellant was litigating a parallel state claim (a writ of administrative mandamus proceeding) and consequently the United States District Court was barred from intervening under the doctrine set forth in Younger v. Harris, 401 U.S. 37 (1971).

Petitioner has challenged the Board of Accountancy's ongoing reliance upon a stipulation obtained by fraud. The ongoing reliance upon that stipulation as late as 2003 provided the basis for initiating suit in 2004. The Board and individual defendants have argued in the proceedings below that Petitioner's claims are time-barred and he should have brought suit back in 1994 when he first discovered the alleged fraud. However, both lower courts failed to acknowledge the ongoing violation precipitated by the Board's continued reliance upon the stipulation in question. While Petitioner challenged this misconduct in state court, he failed. During the pendency of Petitioner's appeal in the federal proceeding, the state matter was resolved against Petitioner. By the time the federal matter reached the Court of Appeals for the Ninth Circuit, there was no state law action for the Younger Doctrine to apply to. Furthermore, both lower courts failed to consider the individual liability of the defendants when broadly applying principles of sovereign and prosecutorial immunity. Neither

principal applies when 1) the individual action is challenged; and 2) said individual action is motivated by fraud or other improper impetus. See Roe v. State of California (2001) 113 Cal. Rptr. 2d 900. Accordingly, liability under 28 U.S.C. § § 1983, 1985, and 1986 apply to prohibit the conduct in question as unlawful.

Certiorari is warranted to explore the issue of whether the lower courts were justified in denying Petitioner further leave to amend in light of the fact that immunity does not extend to the individual bad acts of those parties named as individual defendants to the suit. Further review via certiorari is warranted on the basis that the Court of Appeals erred in holding that the Younger abstention doctrine barred federal court intervention even after the parallel state proceedings had been dismissed.

## BASIS FOR GRANTING THE PETITION

First, the decision of the lower courts in refusing to consider principles of exemption to the doctrines of prosecutorial and sovereign immunity essentially deprives Petitioner of his rights to due process in seeking/reacquiring the property right associated with a license to practice public accounting.

Second, the decision of the lower courts in refusing to apply principles of equitable tolling to render Petitioner's claims against the defendants in

the proceedings below as timely is a further error. The reasoning that a fraudulently acquired instrumentality may be used as a basis for actionable wrongdoing time and time again but challenges to that use are barred because the instrumentality came about beyond the statute of limitations renders the entire application of equitable tolling meaningless in the face of overwhelming appellate guidance suggesting its application for those very purposes.

Third, and perhaps most importantly, there is a gap in appellate guidance providing for treatment of claims brought in federal court while state law claims are pending but resolved while federal decisions are decided on appeal. As a matter of procedure, the question could be posed as follows: If A sues B in federal court and state court and the state court matter is later resolved while dismissal under the Younger preemption doctrine is challenged at the appellate level, can such a dismissal be overturned and the federal matter allowed to proceed in light of the mootness of a Younger defense? Clarification of when Younger applies and does not apply as the existence of a state action barring federal intervention dissipates is very much needed.

## I. THE DECISION BELOW FAILS TO PROPERLY CONSIDER THE LIMITS TO SOVEREIGN AND PROSECUTORIAL IMMUNITY.

The California State Board of Accountancy obtained a consent degree from Petitioner on the basis of fraud and exported Petitioner's signature from a blank form to an agreement revised without Petitioner's knowledge or consent. The Board's ongoing denials of reinstatement in relation to this fraudulently obtained consent degree, after Petitioner has complied with all of its terms, implicates a breach of agreement/contract. This in turn violates Petitioner's civil rights to practice his profession and earn a livelihood doing so.

Although immunity extends to those in prosecutorial positions carrying out functions relating to the prosecutorial exercise, that immunity does not extent to the fraudulent procurement of such agreements, nor does it extend to the breach of such agreements. See Roe v. State of California, supra. The pleadings in the lower court indicate that a contract claim exists. Rather than granting Petitioner additional leave to amend his Complaint, the lower court dismissed the action outright. The named individual Defendants in this matter were state actors, acting under color of state law. As such, they are subject to liability under 42 U.S.C. § 1983 and the related statutes as pled in the lower court. See 42 U.S.C. § 1983 (Lexis 2007). Notwithstanding the immunity granted to the institutional Defendants, individual actors are not categorically subject to such

immunity.

The lower court failed to distinguish litigation activity from a tortious breach of contract which is not immunized. In 1993, after protracted negotiations, over the phone, the Parties, Joel Primes, for the AG's office, the Board and the Plaintiff reached an oral agreement that would reflect the agreement by the parties, namely, that any and all references to FRAUD, DISHONESTY AND GROSS NEGLIGENCE, WOULD BE REMOVED From the agreement. Petitioner, at the behest of AG signed in blank, the signature page, faxed that signed page, with the assurance of the Attorney General's Deputy that the written stipulation, as orally agreed to would reflect the oral agreement by the parties, namely, that any and all references to FRAUD, DISHONESTY AND GROSS NEGLIGENCE, WOULD BE REMOVED From the agreement. However, when petitioner's signature page was attached to the rest of the written stipulation in Sacramento, the document did not match what the parties agreed to. This agreement was made on December 23, 1993 and was to be reduced to writing and presented within weeks, after the seasons holidays, to the Plaintiff. Defendant Joel Primes encouraged Plaintiff, after discussions with the Board to sign a blank signature page and fax it to his office to be matched with the final written documents. Plaintiff refused to do so at first, but after much encouragement and intimidation by the defendant Plaintiff agreed based on the fact that

certainly the Attorney General would keep his word, and the final stipulation would reflect the parties oral agreement. Defendant's mailed the "stipulation" to Plaintiff in April, 1994 two weeks before a meeting with the Board to confirm the terms of probation, which was part of the agreement. This unfortunate arrangement formed the basis over several denials for reinstatement in the ten years that follows. That the lower court could not discern a tortious breach of contract in this matter is surprising.

## II. THE DECISIONS BELOW FAILED TO GIVE THE REQUIRED CONSIDERATION OF WHETHER SUBSEQUENT MISUSES OF AN INSTRUMENTALITY PROMULGATED OUTSIDE THE APPLICABLE STATUTE OF LIMITATIONS PERMITS APPLICATION OF EQUITABLE TOLLING PRINCIPLES.

Petitioner contends that each Defendant named in the proceedings below participated to some extent in the fraudulent procurement of a consent decree arising out of disciplinary action taken by the California State Board of Accountancy. This false document was created in 1994 but has been the basis of the Board's continual denial of reinstatement, up to and including March 2004, mere months before the present action was filed. The courts in the proceedings below failed to properly consider the course of conduct that was

ongoing from 1993 through 2004 in determining whether principles of equitable tolling should be applied.

A statute of limitations may be tolled on equitable principles under circumstances when a defendant's conduct is part of a continuing practice where the most recent act evidencing the continuing practice falls within the limitations period. Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997); Buchholz, et al. v. Midwestern Intermediate Unit IV, et al., 128 Fed.Appx. 890 (3d Cir. 2005). In the specific context of challenges to allegedly retaliatory conduct, the continuing violation "doctrine" is appropriately applied upon a showing of a continuing course of conduct evidencing such conduct. Yanowitz v. L'oreal, 116 P.3d 1123 (2005); Corneveaux v. CUNA Mut. Ins. Group, 76 F.3d 1498, 1507–1508 (10th Cir. 1997) (holding that an adverse employment action occurred when an employee was required to "go through several hoops" in order to obtain severance benefits).

The facts pled in the proceedings below establish a pattern of denials of Petitioner's requests for reinstatement of his license to practice public accounting. All of these denials were in spite of Petitioner's ongoing efforts to comply with the letter of the original 1993 consent degree. Similarly, the Board's refusal to reinstate was also based upon reference to the provisions of that same decree evidencing alleged fraudulent conduct by Petitioner,

which Petitioner contends should have been removed from degree based on a verbal agreement with Joel Prime. In October of 1999 Petitioner's Petition for Reinstatement (PR) was denied by the board and Defendants, again refused to hear the Plaintiffs assertion of innocence from the underlying accusation claiming essentially, that it was too late for any action on that, but they continued to use the failed contract, i.e., the false document, as a basis for denial and also refused to accept Petitioner's proof of rehabilitation. In March of 2001 Petitioner's PR was again denied by the board and they again refused to hear the Plaintiffs assertion of innocence from the underlying accusation claiming essentially, that it was too late for any action on that, but Defendants, continued to use the failed contract as a basis for denial and also refused to accept Petitioner's proof of rehabilitation. In July 2002 Petitioner's PR was again denied by the board and they again refused to hear the Plaintiffs assertion of innocence from the underlying accusation claiming essentially, that it was too late for any action on that, but Defendants, continued to use the failed contract as a basis for denial and also refused to accept Petitioner's proof of rehabilitation. The Board again refused the Petitioner's petition in a similar manner as in three preceding paragraphs above, in the years 2003 and lastly March of 2004. Also again, Defendants refused to hear the Petitioner's side of why he would enter into an agreement to settle a matter, and still maintain no

fault from the accusations, which accusations were not agreed to. Nor would they even allow information about how the failed contract was contrived at with Petitioner's wrongfully obtained signature, but Defendants, continued to use the failed contract, i.e., the false document, as a basis for denial.

The courts in the proceedings below failed to take into account the essential consideration that the conduct of the Board was motivated not out public interest, but instead were retaliatory against Petition because of the 1) his unwillingness to admit to a wrong not committed; and 2) for the past acrimony between the parties. As such, they are appropriately analyzed within the context of the continuing violation doctrine. The courts in the proceedings below refused to consider such an argument. Indeed, the Ninth Circuit Court of Appeal's Memorandum Decision of 12 December 2007 completely overlooks the arguments set forth in both written and oral argument.

## III. THE YOUNGER DOCTRINE WAS IMPROPERLY APPLIED BY THE COURT BELOW BECAUSE NO CONFLICTING STATE ACTION EXISTED AT THE TIME THE MATTER WAS CONSIDERED ON APPEAL.

The Ninth Circuit analyzed the actionability of Petitioner's federal claims in light of a moot point: that

Petitioner had at one time asserted a state law proceeding. Under Younger v. Harris, supra, federal courts are admittedly barred from interfering with state proceedings. However, a gap in precedent exists with respect to the question of whether Younger should apply where the conflicting state proceeding is resolved while the dismissal of the federal case is challenged.

The Younger "Doctrine" is intended to protect state civil proceedings. Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432-34 (1982). Younger applies where there are administrative remedies that must be exhausted before "coercive" federal proceedings are initiated. O'Neill v. City of Philadelphia, 32 F.3d 785, 791 (3d Cir. 1994). However, where there are no state proceedings to protect, the application of the Younger doctrine is improper. Agriesti v. MGM Grand Hotels, 53 F.3d 1000, 1001 (9th Cir. 1995). If state proceedings were once pending but are pending no longer, Younger should only apply as a temporary stay to be lifted upon conclusion of said state proceedings. Gilbertson v. Albright, 381 F.3d 965, 969 (9th Cir. 2004); Voychuk v. California, 2006 U.S. Dist. LEXIS 11888, **7-8 (E.D. Cal. 2006).

The Court of Appeals erred by not properly considering the pendency of state proceedings on appeal in light of the applicable de novo standard of review. The decision of the District Court was excessive in terms of an alternative to dismissal

existing under Younger and its progeny: a temporary stay of federal proceedings pending the resolution of the conflicting state action. See Gibertson, supra. In light of these factors, the appropriate course of action would have been for the Court of Appeals to recognize the procedural status of the conflicting state action at the time of its de novo review (i.e., that it was no longer pending), and remand the matter to the District Court accordingly with instructions to permit Petitioner leave to amend his Complaint further. For the Court of Appeals to uphold such a dismissal in light of authority that provides for a stay is sufficient grounds for reversal. The gap in guidance concerning the resolution of a conflicting state matter while an appeal is taken of a dismissal of the federal matter on (among other bases, Younger exemption), renders the present petition overwhelmingly appropriate.

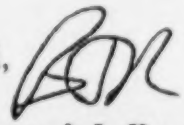
## CONCLUSION

Petitioner has struggled to regain the key to his livelihood as a public accountant for more than ten years. His challenge to the California State Board of Accountancy has encountered myriad stumbling blocks but the most critical of these are the decisions in the Courts below. The continuing violation doctrine should be applied to render the Boards decisions as late as 2004 actionable. The matter of immunity is appropriately left to be resolved upon remand and the

the application of Younger principles is appropriate for further guidance by this Court to determine with greater clarity whether a matter is appropriately remanded where any conflicting state proceedings are resolved while a federal appeal is pending.

For the foregoing reasons, it is respectfully submitted that the present petition for a writ of certiorari be granted.

Respectfully Submitted,



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